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No. 76-990

In the Supreme Court of the United States

OCTOBER TERM, 1976

RALPH JACOBSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner's sole contention is that his conviction for filing a false income tax return is barred by collateral estoppel because of his prior acquittal on an extortion charge.

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of filing a false income tax return in which he failed to report interest income derived from money lending, in violation of 26 U.S.C. 7206(1). The district court sentenced him to a three-year prison term (Pet. 4). The court of appeals unanimously affirmed (Pet. App. A-1 to A-7).

Petitioner had been acquitted two years earlier in the United States District Court for the Eastern District of

New York of having used extortionate means to collect that same interest income, in violation of 18 U.S.C. 894. Petitioner argues (Pet. 8-15) that his conviction for filing the false income tax return is barred by collateral estoppel because of his prior acquittal on the extortion charge.

The doctrine of collateral estoppel prevents relitigation of an issue of fact once the issue has been resolved in a prior lawsuit between the same parties. See *Ashe* v. *Swenson*, 397 U.S. 436; *Turner* v. *Arkansas*, 407 U.S. 366. But no issue of fact essential to the prosecution for filing a false return necessarily was determined in petitioner's favor in the earlier prosecution for extortion. All that the extortion trial settled was that petitioner did not violate 18 U.S.C. 894. As the court of appeals correctly stated (Pet. App. A-4 to A-5), petitioner's acquittal on that earlier proceeding may have turned on the jury's finding that petitioner did not use extortionate means to collect the loans. The element of extortion was irrelevant to the prosecution for failure to report interest income on the loans. Since there is no necessary inconsistency between the acquittal on the extortion charge and the conviction on the tax charge, collateral estoppel did not bar prosecution for filing a false tax return.

Turner v. *Arkansas, supra,* upon which petitioner relies (Pet. 8, n. 5), therefore is distinguishable. In *Turner*, the Court held that a robbery conviction was barred by collateral estoppel after the defendant had been acquitted of murder because the "only logical conclusion" was that the first jury found that the defendant was not present at the scene of the robbery and murder. Thus, the first jury's finding necessarily "negate[d] the possibility of a constitutionally valid conviction for the robbery * * *" (407 U.S. at 369). Here, as we have pointed out, it cannot be said that the only logical conclusion to be drawn from the first

jury's acquittal was that the petitioner did not lend the money and therefore did not receive any interest.[1]

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

MARCH 1977.

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[1] *Ashe* v. *Swenson, supra* (Pet. 8, n. 5), is likewise distinguishable. There, the Court reversed a conviction on the ground of collateral estoppel because the "single rationally conceivable issue in dispute before the [first] jury was whether the petitioner had been one of the robbers. And the jury by its verdict found that he had not" (397 U.S. at 445). Thus, the state was barred from relitigating in another trial the vital issue of whether the defendant was one of the robbers because that issue had already been resolved in the defendant's favor by the first jury.

Finally, *Sealfon* v. *United States*, 332 U.S. 575, upon which petitioner also relies (Pet. 8, n. 5, 13), is not in point. There, the crux of the government's case in the second prosecution was based upon an alleged agreement which the jury in the first prosecution necessarily found not to exist (see 332 U.S. at 580).